BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 565	Case 56 No. 44209 A-4659
and	
CARNES COMPANY	

Appearances:
Mr. Paul Lund, Business Manager, appearing on behalf of the Union.
Michael, Best and Friedrich, Attorneys, by Mr. Marshall R. Berkoff, appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1989-92 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the job assignment grievance of Elaine Lovik, Bruce Wiganowsky and JoAnn Frederickson.

The undersigned was appointed and held a hearing on February 8, 1991 in Madison, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on April 9, 1991.

ISSUES

1. Is the grievance arbitrable?

2. (As proposed by the Union) Did the Company violate the collective bargaining agreement when it did not temporarily transfer displaced Assembler/Machine Operators to the additional Assembler/Machine Operator work that was available in Department 110 on November 21, 22 and 27, 1989?

2. (As proposed by the Company) If the grievance is arbitrable, did the Company violate Article 13, Section 3.1 of the contract by the temporary assignment of Brian Peterson to Department 110 on November 21, 22 and 27 of 1989?

3. If the answer to (2) above is affirmative, what remedy is appropriate?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 8

WAGES

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Section 5 - Temporary Transfers - Temporary transfer is defined as an involuntary transfer of an employee to work at a job classification other than the employee's regular classification, either within a department or between departments. Employees so transferred will continue to hold the classification from which they have been transferred. For the purposes of this Section, a scheduled workday during which an employee works six (6) or more hours at a job other than his regular classification shall constitute a day of temporary transfer. The duration of such temporary transfers may not exceed fifteen (15) scheduled workdays within a twenty-three (23) consecutive scheduled workday period except twenty-five (25) days when the transfer is made to fill an opening left by a person who has moved to another job through a posting.

Employees temporarily transferred to a higher paid job classification will, after five (5) consecutive workdays on that job, be paid at the progression step of that classification closest to but higher than the employee's regular hourly rate. If an employee has had prior experience on a job to which he

or she is temporarily transferred, the Company will pay the higher rate for any day of temporary transfer as defined above. Employees temporarily transferred to a lower paid job classification will continue to be paid at their regular hourly rate. . .

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ARTICLE 13

SENIORITY

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Section 4 - When it becomes necessary to reduce the work force by laying off employees, the Company will follow these procedures:

1. The least senior employees within a classification in any department involved in a reduction will be the first to leave the department.

2. The Company will, by seniority, place such displaced employees in other departments when he can maintain his present classification.

3. If it is not possible for the displaced employee to maintain his classification, he will be offered one of the following options:

   3.1 He will be offered a job in a classification having a comparable pay rate.

   3.2 He may take a lower rated job provided his seniority allows or;

   3.3 He may take a voluntary layoff.

   In the event the employee elects 3.2 or 3.3 above, he will not be recalled or upgraded until there is an opening in his classification.

4. If the employee cannot be placed through 2 or 3 above, he may bump any less senior employee on any job provided he is able to satisfactorily perform the work.

The Company shall advise the Union of such layoff together with a list of the employees so affected three (3) working days in advance. An employee who feels his seniority was not given proper consideration may have access to the grievance procedure, provided that he lodges his complaint prior to the date of layoff or transfer.

Employees who have accepted lower rated jobs or who are currently on voluntary layoff may return to the higher rated job when it becomes available.

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FACTS

The Company manufactures air distribution equipment at its Verona, Wisconsin plant, which has about 300 employes. Among these employes, Elaine Lovik, Bruce Wiganowsky and JoAnn Frederickson were employed up to approximately the summer or fall of 1989 (depending on the particular individual) in the classification of Assembler B, which carried a pay rate, for example, of $9.58 an hour in Lovik's case as of November 1, 1989. As a result of cutbacks in work available, however, all three grievants had by October, 1989 been displaced into the classification of Assembler C, for which Lovik's pay rate on the applicable dates was $8.92 per hour. There is no dispute that Brian Peterson, also an Assembler B by original classification and also displaced originally as an alternative to layoff, was senior to Lovik, Wiganowsky and Frederickson and was working likewise as an Assembler C. There is also no dispute that Peterson, prior to the incident which gave rise to the grievance here, gave up his "displaced" status under the terms of Article 13 of the Agreement by declining an offer of a higher-paying job (because it would have required that he change shifts). Thus Lovik, Wiganowsky and Frederickson were the senior Assembler C employes who enjoyed "displaced" status as Assembler B in October and November of 1989.

It is undisputed that on November 21, 22 and 27 Brian Peterson was assigned by the Company to work in Department 110 on Assembler B work, and that this work had been performed in the past by Lovik, Wiganowsky and Frederickson. All three of the grievants were qualified to perform this work. On November 22, Lovik was also assigned for one day to perform the Assembler B work in Department 110; the balance of the time, all three grievants remained at their Assembler C work. It is undisputed that under the terms of Article 8, Section 5 of the agreement, any of the three grievants would have received the pay rate of an Assembler B if working at that work on the days in question.

The Union presented testimony to the effect that there was a practice in the plant of assigning displaced employes to their former classification when work became temporarily available within that classification. Lovik testified that she was unaware of any instance when an employe who was not displaced from a classification was given work in that classification when a displaced employe was available. And Union Steward Tim Sullivan, who works on the second shift, testified that he had attempted to monitor such temporary transfers consistently to make sure that displaced employes had the first right to such a transfer. Sullivan stated, however, that this did not apply across shifts, and that the Union understood that such transfers would not be made between the first and second shift, or to jobs at the displaced employes' former rate but which the displaced employe had no experience of performing. Sullivan also admitted that there may have been transfers made on the first shift which did not meet what he believed to be the practice, because "nobody policed it". Sullivan further conceded that because Lovik and Wiganowsky were senior to Frederickson, and because at no time on the dates complained of was there work for more than two transferred employes, Frederickson's grievance could not have merit.

The Company presented testimony and an exhibit to demonstrate that there was no consistent past practice of transferring displaced employes to perform temporary work in their former classification. Personnel Manager Bill Bacon testified that the criterion for selection of a temporary transferee was which employe was needed least where he or she was, and contended that this was why Peterson was selected first on the dates in question. Bacon testified that there were six employes on vacation in Department 110, no employes on vacation in Peterson's current department, and some employes on vacation in Department 107 (where the grievants worked) during the days in question. Bacon stated that the fact that the work was made available through vacations meant that there was no job opening as such, and that work was not "available" within the meaning of Article 13, Section 4 of the Agreement, because that does not refer to temporary work. Bacon testified that there is nothing whatsoever in the collective bargaining agreement which addresses the circumstances of this case.

Manufacturing Manager Gary Kubat testified that there was no practice of transferring displaced employes to temporary work in their old classification, and contended that on occasions when this had happened, it was mere coincidence resulting from the application of the "transfer the employe who is least needed" principle. Kubat testified that he had compiled a list of employes transferred in to Assembler B work during approximately a year from December, 1988 to December, 1989, and the Company introduced into evidence an exhibit showing the results. This document (Company Exhibit 4) shows sixteen employes as being assigned into Assembler B work temporarily on various dates and for various lengths of time, during all of which there were displaced employes who were not temporarily assigned into that work. On only four of those dates were the employes given the assignment themselves displaced employes. Kubat testified that he did not extend his search to include temporary transfers into other classifications but that he believed such examples existed.

THE UNION'S POSITION

The Union contends as to arbitrability that the lack of specific language referring to temporary transfer assignments in Article 8, Section 5 does not mean that this grievance is not arbitrable. The Union contends that Article 13, Sections 3 and 4, applies to both seniority and displaced status in the assignment of employes to available higher-paid work. The Union notes that these clauses do not specify any exception for temporary or short-duration assignments, and contends that they can therefore be interpreted relevant to the issue raised in the grievance.

As to the merits, the Union contends that while senior displaced status has not been practical or desirable to apply in every temporary transfer instance, a past practice has existed when a shift change is not involved and when the experience of the senior displaced employe is related to the temporarily available work in the classification from which he or she was displaced. The Union argues that Company Exhibit 4 and Kubat's testimony should be discounted because they were shown to be full of flaws and confusion. The Union also argues that while there was no layoff in progress during the days in question, Article 13, Section 4 still applies because according to Bacon's own testimony, the grievants' displaced status was due to a prior work reduction. The Union requests that the Company be ordered to pay grievant Lovik the differential between B and C pay for 24 hours and grievant Wiganowsky

the same differential for 16 hours.

THE COMPANY'S POSITION

The Company contends as to arbitrability that the arbitration clause in the present contract is a "narrow" clause which restricts the arbitrator's authority to deciding matters which specifically relate to a section or sections of the collective bargaining agreement. The Company contends that a claimed past practice alone is not arbitrable, since arbitrations are limited to grievances and a grievance is defined as a complaint arising out of the contract. The Company contends that while the Union claims that a specific contract clause applies to this instance, there is "not a shred" of evidence that that clause, Article 13, Section 3 and 4, utilizes the factor of displaced status in temporary assignments. The Company argues that because the contract itself is silent on that issue, an arbitrator may not consider a claim of past practice not based on a contract entitlement. To do so would support the Union in its attempt to add a term or condition to the contract rather than to interpret the contract under an existing clause.

As to the merits of the case, the Company argues that Article 13, Section 4 applies a distinction for displaced employes only when a reduction in force situation "is occurring" and that it offers employes who are moved or displaced certain placement options. The Company contends that following the taking of one of these options by the employe, the contract contains no further reference to displaced employes. Therefore, the Company argues, there is no ambiguity in the Agreement to be interpreted, and nothing in the contract specifies that a displaced employe has any rights whatsoever concerning temporary assignments. The Company points to Bacon's testimony as supporting this. The Company contends that its witnesses' testimony that the criterion for temporary assignments is which employe can most easily be spared from his or her current assignment was supported by the lack of consistency in the Union's claim of past practice. The Company points to Sullivan's testimony as admitting that the assignment of temporary upgrades to displaced employes could be a coincidence, and particularly argues that Kubat's sampling of past temporary assignments demonstrates, even within the limited scope of the sampling, a number of instances in which the displaced employe was not selected. Finally, the Company contends that all of the evidence in the record concerning remedy demonstrates that the Company has never agreed to monetary remedies as a result of any kind of time claim, and that in the event that a remedy is ordered, the only appropriate remedy would be a compensating work assignment the next time one became available.

DISCUSSION

As to the first issue, I find the grievance arbitrable. The parties are evidently familiar with the Steelworkers' Trilogy and its progeny, and it is unnecessary to cite a tedious list of precedents to note the long-standing principle that in questions of arbitrability, contract language is construed broadly; the question before the arbitrator initially is therefore whether any contract clause is capable of a construction which would cover the grievance raised. In this instance, Article 13, Section 4, paragraph 4 specifies on its face that "Employees who have accepted lower rated jobs or who are currently on voluntary layoff may return to the higher rated job when it becomes available". This suggests that it is at least a colorable claim that when work needs to be done in the higher rated classification, the displaced employe (i.e. the employe who accepted a lower rated job pursuant to paragraph 3 of the same clause) is entitled to the work. The inquiry cannot proceed further without actually interpreting the meaning of the quoted paragraph, and once contract interpretation is discovered to be the activity in question, the grievance must clearly be arbitrable.

As to the definition of issue number 2, I find that there is no practical difference in this instance between the Union's phrasing and the Company's.

There is no dispute on the facts that the grievants were, at the time of the grievance, in "displaced" status, nor that Brian Peterson was not. Article 8, Section 5, however, provides no method by which any particular employe should be given the temporary transfer in question. Article 13, Section 4, meanwhile, does not identify whether or not a temporary opening constitutes a "available" job within the meaning of that clause. I conclude on the basis of this record that it is a strained interpretation of that clause to hold that jobs were in fact "available" for the grievants in this case.

First, it is common usage in industrial relations to make a distinction between the availability of a "job" and the existence of some work normally assigned to that classification. Under this tradition, a job would ordinarily be expected to be available only when its prior incumbent had left either permanently or for at least an extended period. The parties, in making a distinction in Article 8 between temporary and permanent openings, impliedly recognized the distinction between a "job" as being something that requires posting, and a temporary assignment of work necessary to cover short-term overflows or absences; and in this case it is clear that the work in Department 110 was to cover for vacationing employes.

Furthermore, the Company's evidence was persuasive as to the inconsistency of any past practice claimed by the Union. While Kubat initially had not marked the Company's proposed exhibit in such a way as to identify which employes assigned into Assembler B in the year sampled were in fact displaced employes, the exhibit was amended by joint consent during the hearing to show the identity of those employes. That process left a substantial majority of the assignments still being employes who did not enjoy displaced status, even while displaced employes existed who could have received the temporary assignments. This, and Sullivan's admission that at least on the first shift such assignments may well have taken place, demonstrate that if any kind of practice existed, it was not a clear, consistent and mutually understood past practice which was entitled to enforcement as a mutually agreed interpretation of the "available job" clause. It appears from this record instead that the use of displaced employes to fill temporary transfers into their former work has occurred, where it has occurred, simply by virtue of the fact that they already know how to perform the job and are working at job assignments from which they can often be spared. This does not obligate the Company to make such assignments on a continuing basis, and is not an implied term of the Agreement.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the grievance is arbitrable.

2. That the Company has not violated the collective bargaining agreement by assigning Brian Peterson to Assembler B work in Department 110 instead of the grievants on November 21, 22 and 27, 1989.

3. That the grievance is denied.

Dated at Madison, Wisconsin this 4th day of June, 1991.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator